UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 11097

UNITED STATES OF AMERICA, *Appellant,*

vs.

WALTER LUBINSKI, *Appellee,*

WALTER LUBINSKI, *Appellant,*

vs.

ALASKA STEAMSHIP COMPANY, a corporation, *Appellee.*

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION.

BRIEF OF APPELLANT UNITED STATES OF AMERICA

J. CHARLES DENNIS,
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INDEX

TABLE OF CITATIONS

STATUTES

TEXTS

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STATEMENT DISCLOSING JURISDICTION

This is an appeal from the decree of the United States District Court for the Western District of Washington, Northern Division, sitting in admiralty. The action was instituted by the filing of a libel in personam (Aps. 2) by Walter Lubinski seeking recovery of $25,000.00 damages for the loss of vision in his left eye from the United States of America and Alaska Steamship Company, a corporation,

allegedly due to negligent conditions existing aboard the S.S. "GEORGE FLAVEL." The decree of the lower court dismissed the Alaska Steamship Company as a party to the libel, but entered a decree awarding damages against the United States of America as owner and operator of the vessel in the sum of $17,500.00. The United States of America has appealed from this decree and Lubinski has cross-appealed from the decree of dismissal entered in favor of Alaska Steamship Company.

This action of a maritime nature, is governed by the Suits in Admiralty Act (46 U. S. C. A. §742) and the Jones Act (46 U. S. C. A. §688) and 50 U. S. C. A. §1291). It is properly brought in the United States District Court (46 U. S. C. A. §742), 28 U. S. C. A. 41 (3). From a final decree in appellee's favor and entering judgment in his favor, an appeal lies to this Court. (28 U. S. C. A. §227).

STATEMENT OF THE CASE

Walter Lubinski, a merchant seaman, joined the S.S. "GEORGE FLAVEL" as boatswain at San Francisco, California, in June of 1943. The S.S. "GEORGE FLAVEL" was a Liberty type transport vessel, which had been allocated to the United States Army for operation as a unit of the invasion flotilla assigned to Alaska military operations agains the Japanese (Aps. 234). The cargo consisted

of ammunition and military equipment (Aps. 234). It was loaded on the ship at San Francisco under the supervision of transport officers of the United States Army, who accompanied the ship thereafter at all times on the Alaska invasion (Aps. 273).

In addition to twelve hundred soldiers, the merchant crew of the vessel and a Naval gun crew assigned to the S.S. "GEORGE FLAVEL," there was a Naval amphibious unit aboard numbering approximately sixteen men. Its equipment consisted of gear, landing barges, foodstuffs and smoke or distress signals for each of the eight landing barges (Aps. 276), and was taken aboard at San Francisco.

The smoke or distress signals were contained in a tin gallon can fitted with a screw top; four such signals were packaged in a cardboard carton container. (Aps. 276). These signals are customarily used at sea and carried in lifeboats for emergency use (Aps. 301). To release the signal, the cap is unscrewed and an orange substance, lighter than air, is emitted. (Aps. 276). The chemical composition of these signals was not disclosed during the trial of the action.

At San Francisco the equipment of the amphibious unit had been stowed on the open deck of the vessel (Aps. 276), because of unavailability of other stowage space (Aps. 298). As the vessel proceeded north to Alaska, this equipment was

exposed to the rain and was deteriorating (Aps. 279). To prevent further damage, Chief Mate Kristiensen ordered Lubinski, as boatswain, to stow it in the forepeak of the vessel. (Aps. 302). Captain Goodwin, Master of the vessel, felt this was the safest place to stow the equipment (Aps. 236), and there was plenty of available space in the forepeak. (Aps. 247). In addition the amphibious unit was permitted to work on its invasion equipment in the forepeak (Aps. 237), after it was stowed there. As boatswain, Lubinski was in charge of the forepeak and had a key to it.

Access to the forepeak was furnished by means of a steel ladder running from a hatch in the main deck to this compartment which is located in the extreme forward end of the vessel. (Aps. 108). There is a carpenter shop aft adjoining the forepeak. (Aps. 109).

On the night of July 15, 1943, the S.S. "GEORGE FLAVEL" was lying at Attu, Alaska. Lubinski and other seamen were repairing some gear in No. 2 hold. (Aps. 57). A seaman, Steve Uzdadinis, was sent by Lubinski to the forepeak for some tools. (Aps. 57). Uzdadinis's testimony as to his actions in the forepeak is confusing and evasive. In his search for tools, he stated he visited the carpenter shop aft and "supposed" he kicked a case containing some smoke signals. (Aps. 171). Thereafter he returned to the No. 2 hatch and proceeded to lower the tools down to the lower

hold. After the expiration of some time, estimated variously as one hour by Peter Corvia (Aps. 209), as ten minutes by Robert T. Kennedy (Aps. 351), and as five minutes by Uzdadinis (Aps. 172), someone shouted "Fire in the Forepeak."

First Mate Kristiensen, Second Officer Seather, Lubinski and other seamen rushed to the forepeak, where orange colored smoke was billowing forth through the hatch opening to the forepeak. (Aps. 63). Lubinski donned a regulation U. S. Army gas mask (Aps. 147), and went below on several occasions to investigate the cause of trouble. The gas mask he used fitted snugly over his face (Aps. 147), and his eyes were protected from contact with the smoke by the mask. (Aps. 147). The same mask was subsequently used by Chief Mate Kristiensen and Second Officer Seather (Aps. 314), who likewise descended into the forepeak to investigate the cause of the smoke. No fire was discovered. Later the charred remains of a smoke signal were found in the forepeak back of the ladder leading to the main deck some distance from the carpenter shop. (Aps. 311). The screw cap of the tin containing the smoke signal was missing (Aps. 378), and the container was empty.

Lubinski claimed when he removed his mask after visiting the forepeak, both of his eyes burned badly (Aps. 66), and were swollen. (Aps. 67). Subsequently his right eye

recovered, but he claims he was required to receive constant treatment aboard the vessel from the Army Transport Surgeon, Dr. Paul Zeigler, for the ensuing month following this incident, because of pain and impaired vision in his left eye. Dr. Zeigler, the transport physician, states he first treated Lubinski the latter part of August, 1943 (which would be subsequent to the Kiska incident hereinafter referred to). (Aps. 500).

On the morning of the Kiska invasion (August 15, 1943) the S.S. "GEORGE FLAVEL" was lying near the beahhead having begun the discharge of soldiers and supplies about five o'clock that morning. Soldiers were discharging military supplies from No. 3 hatch aft about 10:00 A. M. that morning under the supervision of a United States Army Transport Officer, Lt. Hill. (Aps. 290). Smoke was observed issuing from No. 3 hatch and a fire alarm was sounded. (Aps. 69). Lubinski went below to investigate. (Aps. 79). He again wore a regulation U. S. Army gas mask. (Aps. 149). He remained below eight minutes. (Aps. 149). A dense pall of smoke was rolling out of the No. 3 hatch making visibility very poor. As Lubinski started to emerge from the hatch and mount the ladder leading to the deck, he claims to have been struck in the face by the force of a deck hose which was being played on the fire below by seamen unknown to him (Aps. 149), but identified by another witness as members of the steward's department. (Aps. 199).

Lubinski claims his gas mask was knocked momentarily to one side (Aps. 150), which exposed his face to the smoke in the hatch for about twenty seconds, during which time he ascended the ladder without replacing his mask in position. (Aps. 80, 150).

It was subsequently discovered that the fire at Kiska in No. 3 hatch was caused by an Army vehicle, a "snow jeep" which had been stowed in the "tween decks" of No. 3 hatch and which backfired when some soldiers started it preparatory to its discharge. (Aps. 368). Some dunnage bags in the jeep were ignited and created a "rubbish smoke." Aps. 368).

After the Kiska invasion the S.S. "GEORGE FLAVEL" returned to Adak where she remained for about eight days. Lubinski testified he was given "hypos" for excessive pain in his left eye (Aps. 80), during this period. He was next examined by the United States Health Service in Honolulu, where the vessel put in after leaving Alaska, and was advised to return to the States. (Aps. 81). The voyage terminated in Seattle, Washington, in September, 1943. (Aps. 81).

Lubinski entered the United States Marine Hospital in San Francisco, California, where he was a patient from October 18, 1943, to February 9, 1944, receiving treatments for his left eye. The disease which has admittedly de-

stroyed the vision in his left eye is a disease of the inner structures of the eye, described as an "iritis" or an "iridocyclitis."

QUESTION INVOLVED

This appeal presents only a question of the validity of the findings of fact, conclusions of law and decree awarding appellee $17,500.00 damages against the United States of America, for the loss of vision of his left eye. The appeal is here de novo.

EFFECT OF DISTRICT COURT'S FINDINGS AND DECREE

In the District Court, eighteen witnesses testified, ten of whom testified by deposition. Of the eight witnesses who testified orally, only appellee, Robert Kenny, a seaman, and appellee's expert witness, Dr. Dorman, testified to substantial matters. Appellee's key witnesses as to the asserted negligence, Steve Uzdadinis and Peter Corvia, as well as all of appellant's material witnesses, except Dr. Morrow, its expert, testified by deposition.

Under such circumstances the presumption in favor of the findings of the trial court will be accorded its lightest weight.

The Diamond Cement, 95 F. (2d) 739 (CCA9).

As this court said in the recent case of *Matson Navigation Co. vs. Pope & Talbot,* decided May 19, 1945, 149 F. (2d) 205:

> "The rule in admiralty cases is that, although an appeal opens the case for a trial de novo, findings of fact are entitled to great weight, but such rule is modified where the findings are based wholly upon depositions. * * * (citing cases). In cases in which witnesses testify in open court and depositions are also introduced, the rule is subject to modification n the sound judgment of the appellate court."

In *The Ernest H. Meyer,* 84 F. (2d) 496, ths court said:

> "It is obvious that where the testimony is in part by deposition and in part, heard by the court, and the conflict is between the heard and unheard witnesses there cannot be a balancing of credibility between the two."

This case presents a situation where nearly all of the substantial evidence in the case was presented by deposition with the appellate court being in as favorable a position as the trial court in determining the credibility of the witnesses and the weight to be accorded their testimony.

See also *Thomas vs. Pacific S. S. Lines,* 84 F. (2d) 506.

BURDEN OF PROOF ASSUMED BY APPELLEE

Under the Jones Act (46 U. S. C. A. §688) seamen are given the same rights for negligence as railroad employees are given under the Federal Employers Liability Act (45 U. S. C. A. §51 et seq.), and assume the same procedural burdens.

The United States Supreme Court in the recent case of *Atlantic Coast Line v. Tiller,* 318 U. S. 54, 87 L. Ed. 610, has held that in order to sustain a recovery in this type of litigation two elements must be proved by a preponderance of evidence; (1) negligence of the employer, and (2) that such negligence was the proximate cause of the accident in whole or in part.

Nor is the scintilla of evidence rule recognized in cases under the Federal Employers Liability Act as meeting the burden of proof cast upon a plaintiff. Substantial evidence as to negligence and that it was the proximate cause of the injury claimed are indispensable requisites to recovery.

> "It is clear under the federal decisions that the so-called scintilla of evidence rule is rejected and that substantial evidence must be produced by the plaintiff in order to sustain the burden of proof. *Pennsylvania R. Co. v. Chamberlain,* 288 U. S. 333, 53 S. Ct. 391, 77 L. Ed. 819 (citing cases * * *. Such evidence must be direct or circumstantial but there must be substantial evidence, direct or circumstantial to show that negligence on the part of the carrier was the proximate cause or one of the proximate causes of the accident. Evidence which leaves the determination of these essential facts in the realm of mere speculation and conjecture is insufficient. (Citing cases).
>
> *Showalter v. Western Pacific R. Co.* (Cal.) 96 Pac. (2nd), 964 at p. 966.' "

This court has repeatedly required a seaman suing under the Jones Act to establish the claimed acts of negligence by the shipowner by substantial evidence.

In the very recent case (decided June 13, 1945), *Drain vs. Shipowners & Merchants Towboat Co., Ltd.,* 1945 A. M. C. 892, this court commended the following statement made by District Judge Goodman:

> "The Supreme Court has held that seamen are wards of the Admiralty and that the policy is to afford them the fullest protection. That protection extends to their maintenance and cure in case of injury, and also of course to their compensation for disability suffered in the course of their employment. That does not mean, however, that seamen will get a judgment when there is no liability at all. In this case there is not the slightest evidence of negligence."

And earlier (1942) in *De Zon vs. American President Lines,* 129 F (2d) 404, this court said:

> " * * * We must also be mindful of the fact that although the Jones Act has given 'a cause of action for the seaman who has suffered personal injury through the negligence of his employer,' still it does not make negligence which was not negligence before and does not make the employer responsible for acts or things which do not constitute a breach of duty."

In *American Pacific Whaling Co. vs. Kristensen,* 93 F. (2d) 17, this court said of an action by a seaman under the Jones Act:

> "It will thus be seen that negligence constitutes the gravamen of this case. Defective appliances are not per se due to the negligence of the employer, as in other cases of admiralty and he is not liable for 'any defect or insufficiency in plant or equipment that is not attributable to negligence.' "

In two cases, *The Cricket* 71 F (2d) 61, and *The Baymead,* 88 Fed. (2d) 144, this court held a shipowner was not required to furnish the best possible accommodations for the crew.

NEGLIGENCE UNDER JONES ACT

Negligence has generally been defined as follows:

> "Negligence in the popular sense is the lack of due diligence or care. Actionable negligence or negligence in the legal sense has been defined as a volation of the duty to use due care. It is doubtful, according to some authorities whether a more comprehensive definition is possible."

38 *Am. Jur.,* §2 pg. 642.

The United States Supreme Court has defined this concept under the Jones Act in the case of *Cortes vs. Baltimore Insular Lines,* 287 U. S. 367, 77 L. Ed. 368, as follows:

> "Congress did not mean that the standards of legal duty must be the same by land and sea. Congress meant no more than this, that the duty must be legal, i.e., imposed by law; that it shall have been imposed for the benefit of the seaman, and for the promotion of his health or safety; and that the negligent omission to fulfill it shall have resulted in damage to his person. When this concurrence of duty, of negligence and of personal injury is made out, the seaman's remedy is to be the same as if a like duty had been imposed by law upon carriers by rail." * * *

LEGISLATION FOR WARTIME MERCHANT SEAMEN

With the advent of World War II and the operation of all merchant shipping by the United States government as

an aid to the successful prosecution of the war the peace time hazards of merchant seamen were considerably enlarged. They then became exposed to two types of injuries, (1) those incident to the peace time operation of merchant vessels and (2) war risks.

With its traditional liberality for seamen, Congress legislated in the interest of the new status of merchant seamen employed on government vessels during war time. As to the first type of injury, Congress by the act of March 24, 1943, 57 Stat. 45, 50 U.S.C.A., §1291, extended to such seamen the same rights for the enforcement of a claim of personal injuries as *"if the seamen were employed on a privately owned and operated American vessel.* This legislation obviously made available the Jones Act to wartime merchant seamen in cases of negligence.

As to war risks which these seamen encountered, pursuant to Congressional authority (46 U.S.C.A. §1128 (a), the Maritime War Emergency Board promulgated on March 15, 1943, a comprehensive life and disability insurance policy applicable to all seamen sailing on governmentally operated vessels. It is known as "Second Seamen's War Risk Policy," which is set out in full in the 1943 Supplement to the Code of Federal Regulations, Title 46, page 2127 et seq. The cost of this insurance was born exclusively by the government.

Undoubtedly the difficulty of applying the usual peace time formulae of negligence to war shipping conditions was one of the considerations impelling the promulgation of the Second Seamen's War Risk Policy by the United States.

It is appellant's position that if appellee can substantiate that the loss of vision in his left eye was due to the exposure to the smoke of the distress signal at Attu, Alaska, on July 15, 1943, or to the smoke from the burning "jeep" at Kiska, Alaska, a month later, his claim could be covered under the Second Seamen's War Risk Policy.

FIRST ASSIGNMENT OF ERROR RELIED UPON

(1) The Court erred in making finding of Fact III for the reason that said finding is not sustained by the weight of the evidence and is clearly erroneous. (Aps. 21.)

The finding of fact attacked reads as follows:

> "That sometime prior to the 15th day of July, 1943, while said vessel was in navigable water at Attu, Alaska, the officers of said vessel negligently permitted and directed the stowage of certain smoke signal bombs in the forepeak of said vessel along with the gear of said vessel. That on the 14th day of July, 1943, a member of the crew of said vessel entered the forepeak for the purpose of obtaining gear and while there knocked over or kicked over one of said smoke signal bombs, causing the escapement of a large quantity of gas, smoke and fumes. That libelant, in the course of his employment, entered said forepeak for the purpose of assisting in extinguishing said gas, smoke and fumes therefrom,

and that the gas, smoke and fumes therefrom, permeated libelant's gas mask and irritated and injured his eyes. That shortly thereafter libelant's eyes became inflamed and resulted in a loss of vision in his left eye. (Aps. 15.)

This article makes two distinct charges of negligence, (1) improper stowage of the distress signals in the forepeak of the S.S. "GEORGE FLAVEL" and (2) a subsequent knocking over or kicking of the distress bomb resulting in the escapement of its contents by a seaman not identified in the libel but subsequently asserted to be one Steve Uzdadinis, appellee's sole witness to this alleged incident. These incidents will be discussed separately.

CARGO ORIGINALLY STOWED BY ARMY

The testimony establishes that on or about June 25, 1943, the S.E. "GEORGE FLAVEL" was assigned exclusively to the United States Army to carry troops and ammunition and military supplies for the Alaskan invasion and the loading thereof began and was completed in San Francisco, California, under the exclusive supervision of officers of the United States Transportation Corps, who thereafter accompanied the vessel North.

Captain Charles L. Goodwin testified:

"Q. Did you as master of the vessel have anything to do with loading these supplies?

"A. No, sir.

"Q. Who loaded them?

"A. That was loaded by the Army." (Aps. 234.)

After the vessel reached Alaska, the same procedure obtained. Captain Goodwin further testified:

"Q. Were you also taking on and discharging cargo after reaching Alaska?

"A. Yes.

"Q. Who was in charge at that time of designating what cargo would be loaded and where it would be stowed?

"A. The Army." (Aps. 238.)

Similar testimony was given by Chief Officer John Kristiensen (Ape. 272, 273) and Second Officer Jorgen L. Seather. (Aps. 322 and 323.)

STOWAGE OF SMOKE SIGNALS IN FOREPEAK

Chief Officer Kristiensen testified that the equipment of the Naval amphibious unit, consisting of rations and distress signals and gear was stowed forward on the main deck when the vessel left San Francisco, (Aps. 275) and was deteriorating enroute to Alaska because of being exposed to rain and sea dampness so he ordered appellee, as boatswain to stow this equipment in the forepeak. (Aps. 302.) He explained:

"A. Yes. All the food was lying around there. I thought it was a shame for it to be lying around. And also the smoke bombs with it. It was all lying there and would get spoiled; malted milk, biscuits and crackers and all that stuff. It was all mixed together." (Aps. 302.)

As befitted the tragic necessities of the vessel's mission, stowage space was at a premium and there was no place available other than the forepeak for the stowage of this deteriorating military equipment.

Chief Officer Kristiensen testifiel:

"A. Yes, that is the only place we had to put them. Lockers were very scarce aboard because they had everything filled up that they possibly could." (Aps. 928.)

Captain Goodwin, who had approved the stowage of this equipment in the forepeak and peermission for the amphibious unit to work there while the vessel was enroute to invasion points, said he did so for the following reasons:

"Q. Why did you think the forepeak would be the safest port of the ship to stow any of this invasion cargo?

"A. The only ones which had access to it was our crew and if we stowed it down in the holds, they might be down there looking for something else, the Army, when they were looking for different items. And it was handy to get at in case you needed it in a hurry and you want to get it in a place so if you need something you can get it in a hurry." (Aps. 236.)

Captain Goodwin corroborated Chief Officer Kristiensen that the forepeak was the only available spot for this stowage.

> "Q. The forepeak of a new ship like "FLAVEL" and with new equipment is usually pretty full?
>
> "A. No. Ours was not so full. We had lots of space there." (Aps. 247.)

Appellee admitted that when the vessel left San Francisco every available space for cargo was occupied.

> "Q. But every conceivable space for cargo was used when you left San Francisco, wasn't it?
>
> "A. Yes." (Aps. 104.)

Appellee described the equipment of the Naval amphibious unit stowed in the forepeak as food rafts, guns and smoke signals, and they were exposed to the elements:

> "Q. And those had all been laying on the deck exposed to the elements before they were stowed in the forepeak,
>
> "A. Yes, sir." (Aps. 104.)

The smoke signals, destined for installation of the landing barges, were packed four to a cardboard carton container and the signal itself, a chemical, was encased in a gallon tin container, and securely stoppered with a screw cap as a safeguard against tampering. (Aps. 276.) There were several of these cases (Aps. 110). Appellee claimed

they were stowed in the forepeak and aft in the carpenter shop (Aps. 276) while Chief Officer Kristiensen testified they were stored on the starboard side of the forepeak, only, under some shelves. (Aps. 277.)

As to his reason for permitting the Naval amphibious unit to use the forepeak of the vessel while they were cleaning and assembling their guns, Kristiensen testified:

> "A. They were guns for the landing barges, yes. They were boxed up, yon know, and came aboard mixed in with the rest of the stuff that they picked out. Instead of being on deck, I let them go down there and do it because it was dry down there, and wet and miserable on deck." (Aps. 280.)

Thus, the stowage of this equipment in the forepeak accomplished a dual beneficial purpose of preventing the destruction of vital military equipment and affording the amphibious unit necessary quarters to prepare their ordnance for the contemplated invasion.

DISTRESS SIGNALS NOT BOMBS OR AMMUNITION

The trial court evidently labored under a misapprehension as indicated in Finding of Fact III and its memorandum opinion that the distress signals possessed the hazards and propensities of military bombs or ammunition and were, *per se,* dangerous instrumentalities. The evidence warrants no such inference. Even conceding the correctness of the

trial court's belief, the stowage of the bombs in the fore-peak was a matter of sheer military necessity and exigency since no other space was available aboard the vessel for their reception. Applying the peace time formulae of "due care" to the incongruous situation of a military invasion this stowage would still meet the requisite test of an act which a reasonable man would feel obliged to do under these extreme circumstances.

The chemical composition of these devices was not disclosed at the trial of the case other than the fact the containers released an orange colored signal haze or smoke when unscrewed. There was no testimony or inference that they generated fire, or could be classed as combustibles or pyrotechnics. Chief Officer Kristiensen vigorously denied these signals were ammunition:

> "A. You cannot call that ammunition because that is why we have lifeboats. They have them in the lifeboats for distress.
>
> "Q. Smoke bombs?
>
> "A. Yes. We have them in the lifeboats. They put them on the water at sea and in case we are in distress some ship can see them. That is what they are for." (Aps. 301.)

Second Officer Seather likewise declared the signals as non-hazardous.

"A. Well, they are all supposed to be safe, and there are several, to my knowledge, when they come aboard —we have several cases on board the ship right now. It is ship's gear regulation equipment." (Aps. 378.)

It is quite likely that the court was misled as to the propensities of these distress signals by the frequent reference to them in the trial of the action below as "smoke bombs," a title by which they are loosely characterized by seamen. However, there is no evidence in the record they possess those explosive or detonating qualities commonly associated with bombs. The record shows they are designed for emergency use at sea, solely for signal purposes. It must be assumed since their use may be required by persons huddled on life rafts or in lifeboats, and the signal released in the immediate vicinity of such persons who have no control over atmospheric conditions, that such signals possess only harmless ingredients.

APPELLEE'S PROOF OF NEGLIGENT STOWAGE

To establish proof of negligent stowage of the smoke signals in the forepeak, appellee relied upon his Exhibit 3, a publication of the United States Coast Guard, entitled "Regulations Governing Transportation of Military Explosives on Board Vessels during Present Emergency" (Aps. 99) and the supposedly expert opinion of appellee himself, and three seamen witnesses, John Connolly, Nicholas M. Gladis and William Huck.

COAST GUARD REGULATIONS OF STOWAGE

Appellee's Exhibit 3 was dated October 1, 1943. It was admitted over appellant's objection as to incompetency and immateriality, (Aps. 99) there being no proof tendered these regulations were in effect on July 15, 1943, the date of the escape of the smoke signal from its container at Attu, and they were inapplicable to the S.S. "GEORGE FLAVEL."

These regulations are issued pursuant to authority conferred upon the Secretary of Commerce to regulate the shipment of explosives on vessels on the navigable waters of the United States by Section 170 (7) (a) of the 1940 Federal Carriage of Explosives or Dangerous Substances Act, 46 U.S.C.A. Sec. 170 (7) (a).

By Section 170 (1) the 1940 Act is specifically declared to be inapplicable to *"any public vessel which is not engaged in commercial service."*

This specific exemption of applicability of the 1940 Explosives Act and regulations promulgated thereunder to public vessels is re-enacted in Section 146.02-2 (a) of Appellee's Exhibit 3, (Code of Federal Regulations of the United States of America, Cumulative Supplement, Title 46, Page 10776, which reads as follows:

> "Sec. 146.02-2 (a) The regulations in this part shall not apply to any public vessels which is not engaged in commercial service."

It is to be noted that the 1940 Federal Carriage of Explosives Act was passed before the Second World War and its primary purpose was the regulation of the carriage of explosives on merchant and passenger ships.

That the S.S. "GEORGE FLAVEL," used exclusively as an Army Transport under the sole jurisdiction of the United States Army, carrying troops and ammunition exclusively for the Alaska invasion was a public vessel of the United States seems too plain to require citation of authority.

In so classifying a merchant vessel loaded with relief supplies destined for Belgium after the termination of the First World War, the United States Supreme Court, in the case of *United States vs. Thompson* (1922) 257 U. S. 419, 66 L. Ed. 299, said:

> "It is suggested that the Western Maid was a merchant vessel at the time of the collision, but the facts the food was to be paid for and the other details adverted to cannot disguise the obvious truth that she was engaged in a public service and that was one of the constituents of our activity in the war and its sequel and that had no more to do with ordinary merchandising *than if she had carried a regiment of troops.*"

See also *The Lake Lida* (C.C.A. 5) 290 F. 178.

Obviously Appellee's Exhibit 3 laid down no duty which was breached by the S.S. "GEORGE FLAVEL" in stowing

the distress signals in the forepeak and was inapplicable to the voyage in question.

APPELLEE'S EXPERT WITNESSES ON STOWAGE

Appellee called three fellow seamen, Nicholas M. Gladdis (Aps. 70), William Huck (Aps. 140), and John Connolly (Aps. 143), who testified as to the common practice existing in merchant vessels in stowing combustible materials in lockers. Appellee himself so testified (Aps. 53, 54, 55). Such standards of practice existing on merchant vessels furnish no criteria for a vessel, such as the S.S. "GEORGE FLAVEL," which was a component of the Alaska invasion flotilla and under the sole jurisdiction of the United States Army. Distress signals cannot be classified as "combustibles" since they do not produce fire. Testimony of this character given by libelant and the three seamen has been previously characterized as of little probative value on an issue of negligence.

> "Here the witness was not qualified as an expert. The record discloses nothing as to his age, general experience at sea or particular experience as a boatswain. We understand a boatswain to be nothing more than a seaman who superintends the work by the crew. He is an intermediary who transmits orders from the master or mates to the crew. He is not required to be licensed. One who serves in such capacity does not thereby become a nexpert." *The Liberty Glo,* 1937 A.M.C. 111 (Delaware Supreme Court).

Even in commercial stowage of cargo, the master of the vessel is only required to use due diligence.

> "The master of a vessel is bound to use due diligence and skill in stowing and staying cargo; but there is no absolute warranty that what is done shall prove sufficient."

The Hornet, 58 U. S. 100, 17 How. 100, 15 L. Ed. 58.

It is submitted that there is not a scintilla of evidence justifying the lower court's findings of improper stowage of the smoke signal in the forepeak.

ESCAPE OF SMOKE SIGNAL AN INTERVENING CAUSE

It the court is of the opinion that negligent stowage has been proven, and Uzdadinis' testimony establishes negligence, then it is submitted that as hereinafter discussed under the basic rules of negligence, the act of negligent stowage is too remote an incident to be considered as the proximate cause of whatever injury appellee suffered at Attu. This would be due to a new, active and efficient cause, namely, the alleged kicking of a smoke signal container by Uzdadinis some weeks after stowage in the forepeak of the signal containers.

> "An act which furnishes the opportunity for the infliction of an injury is not the proximate cause of the injury, where the latter occurs as the direct result of some intervening force. Thus where a negligent act

> creates a condition which is subsequently acted upon by another unforseeable, independent and distinct agency to produce the injury, the original act is the remote and not the proximate cause of the injury, even though the injury would not occur except for the act. In such a case the law being concerned with proximate rather than the remote cause does not look beyond the cause of injury most recently operative in determining liability for the injury." 38 *American Jurisprudence,* Sec. 68, p. 725.

The United States Supreme Court has announced and applied this rule in a number of cases, the leading case being *Atchison T. & S. R. Co. vs. Calhoun,* 213 U. S. 1, 53 L. Ed. 671, where the court said:

> "Where in the sequence of events between the original default and final mischief an entirely independent and unrelated cause intervenes and is of itself sufficient to stand as the cause of the mischief, the second cause is ordinarily regarded as the proximate cause and the other as the remote cause. *Louisiana Mut. Ins. Co. vs. Tweed,* 7 Wall 44, 52, 19 L. Ed. 65, 67.*This is emphatically true when the intervening cause is the act of some person entirely unrelated to the original actor.*" (Italics ours.)

NO EVIDENCE TO SHOW WHAT CAUSED DISTRESS SIGNAL TO ESCAPE

As one of the links in the chain of alleged negligence set out in Article II of the libel it was requisite that appellee prove, by a preponderance of the evidence *"that a member of the crew of said vessel entered said forepeak for the pur-*

pose of obtaining gear, and while there negligently knocked or kicked over one of said smoke signal bombs, causing the escapement of a large quantity of gas, smoke and fumes." (Italics ours.)

This burden is sought to be met by the extremely dubious and speculative testimony of Steven Uzdadinis, the sole witness for appellee on this ground of negligence, who testified by deposition (Aps. 167) so that this court has as good an opportunity as the trial court of appraising the witness' credibility and the probative value of his testimony.

TESTIMONY OF UZDADINIS

Uzdadinis testified he was a member of the crew of the S.S. "GEORGE FLAVEL" at the time of the escape of the smoke signal in the forepeak. (Aps. 168.) He stated he was sent to the forepeak for some tools (Aps. 169), and in his search passed from the forepeak aft into the carpenter shop where he observed several cases of smoke bombs stored. He then testified, on direct examination:

> "A. I looked around, I rummaged around in those tools for a bit, in the tool case, and *I supose* I happened to kick the first case that was right by me and then I left.
>
> "Q. What was in the case that you kicked?"
>
> "A. Well, *as far as I remember,* I noticed one occasion before that, I looked in that case and *I think* there

was one of the smoke bombs missing!" (Italics ours.) Aps. 171, 172.)

He then stated he remained in the carpenter shop for fifteen seconds and then proceeded forward through the forepeak to the deck, then returned to No. 2 hold and lowered the tools. About five minutes later he claims he heard the call of "Fire." (Aps. 172.)

On cross examination, he testified as follows:

"Q. After going into one storeroom you went in the carpenter's room?

"A. Yes, I did.

"Q. And you couldn't find what you were looking for?

"A. That is right.

"Q. While you were down there you didn't take one of those smoke bombs out of a box, did you?

"A. No, I did not.

"Q. You didn't touch one of the smoke bombs, did you?

"A. I did not.

"Q. You did not pull the pin out of the smoke bomb, which would release the smoke?

"A. No.

"Q. You didn't handle the bombs in any way?

"A. I did not.

"Q. As I understand it, all you did was to give one of the boxes a kick?

"A. Well, there was one box I picked up, and I tossed it to the side a little more, and this one in particular, I just kicked it. Well, I kicked it enough so that it would move about roughly a foot, and probably went like that (illustrating). (138)

Mr. Levinson: You illustrated a sort of bouncing motion?

The Witness: Yes, I did.

"Q. (By Mr. Morrow): And nothing happened when you kicked it?

"A. No; nothing happened.

"Q. No smoke came out?

"A. No. the box was completely covered. I mean it still had its cover on.

"Q. As I understand, you were down there about a minute after you did that?

"A. Well, I was there in the carpenter shop about a minutes, yes—no, about fifteen or twenty seconds or so. Immediately after I kicked that I walked out of there, and then I took one more look around the forecastle.

"Q. And there was no smoke coming out of there at that time?

"A. No." (Aps. 176, 177.)

He further testified:

"Q. Well, you didn't notice any smoke there?

"A. I didn't notice anything.

"Q. As a matter of fact, you thought you might have caused this?

A. Yes. I have always had that in mind.

"Q. You have had that feeling?

"A. Yes.

"Q. But there is really nothing at all which you can state which you definitely think caused that?

"A. Well, because of the fact if I kicked that, I immediately knew that there was smoke bombs in that case, and I kind of heard—or I mean I thought—I knew it was that, because I kind of heard that because the way the gas behaved, and I thought back a little before, and I remembered looking in that case, and I saw there were three of them in there instead of four, and one was missing. There may have been six, but I thought it was four in the case, so that is why I have always had the feeling that I caused it.

"Q. But you do not know that any one of those bombs emitted any smoke, do you?

"A. Well, yes, after they brought it up. I saw the can, and the can was exactly the type of can that I saw in that case. I knew it was a can like that.

"Q. You knew it was a can like that, but you do not know whether it was that particular can?

"A. No, I do not.

"Q. Or one of the cans in that particular case?

"A. No; I don't know if it was exactly one of the cans in that particular case. It may have been the case

that I tossed up. I mean I picked up a case and threw it maybe three feet away from me, upon top of another pile.

"Q. Or it might have been any other can down there in the forepeak?

"A. Yes.

"Q. That is right, isn't it?

"A. Well, it could be.

"Q. In other words, you do not know that you caused the gas to emit from any of those cans—you do not know it actually of your own personal knowledge, do you?

"A. No, I really don't know.

"Q. You did not know, either, whether one of the members of theh amphibious force entered the forepeak after you were there?

"A. Well, I don't know, but I am sure—I always had the belief that I was the only one in that forepeak because of the circumstances involved. In other words, I did not think anyone had time enough to get up to the forepeak, or anything like that.

"Q. That is what you feel and think?

"A. That is what I feel and think.

"Q. And not what you actually know?

"A. No, I don't know, actually know it." (Aps. 178, 179 and 180.)

Summarized, Uzdadinis' testimony amounts to no more than his vague surmise and recollection that he kicked a carton containing smoke bombs *"roughly a foot"* and nothing developed. Some five minutes later after leaving the forepeak smoke was discovered there which was later proven to have come from a distress signal, removed from its container and the top of which had been manually unscrewed. There is no postive or convincing testimony that the supposed actions of Uzdadinis in kicking the carton, produced the escape of the smoke signal, nor that he actually kicked the carton container encasing the signal which escaped *There is no proof whatever that Uzdadinis or any other member of the vessel's crew removed the can from its case and unscrewed the top, the only act which could have permitted the signal to escape.*

There is a conflict of testimony between Uzadadinis and two other witnesses of appelle as to when the escape of gas was noticed after his visit to the forepeak. Peter Corvia said it was an hour (Aps. 209) while Robert T. Kenny thought it might have been ten minutes. (Aps. 351.)

Other testimonial facts indicate that Uzaddinis' supposed conduct had nothing to do with the escape of the contents of the smoke signal.

The discharged smoke signal, when recovered, was found not in the carpenter shop, where Uzdadinis claimed he may

have kicked the case of signals, but a considerable distance forward in the extreme forepeake, behind the ladder leading to the main deck. (Aps. 311, 312.) When recovered, the screw cap was missing (Aps. 332). Second Officer Seather testified after the escape of the signal, he examined the cases, and found one had been broken open and one of the smoke signals was missing from the case, which he assumed was the one which escaped.

Both Chief Mate Kristiensen and Second Officer Seather testified that a kick such as Uzdadinis claimed to have administered to the sealed carton containing the signals could not possibly dislodge the cap of any of the containers so that the contents would escape.

Kristiensen said:

> "Q. It is possible if that cap had been loose that the jar or knocking it over would have loosened it and knocked it of? It is just a screw cap?
>
> "A. Yes, it is a screw cap but it is not that loose. If they threw that carton all around, the cap wouldn't come of." (Aps. 313.)

Seater testified similarly:

> "Q. And if it is not put in tightly a jar would knock it out, wouldn't it?
>
> "A. No; a jar would not knock it out. It would have to be loosened, and it is a screw cap." (Aps. 378.)

Access to the forepeak was available at the time in question not only to the amphibious unit, which according to Uzdadinis' testimony still had their guns as well as distress signals stowed in the carpenter shop, but also to other members of the ship's crew. If Uzdadinis' testimony is to be given any credence whatever, after his alleged act of kicking the carton of signals *"a foot,"* some unknown individual followed him into the forepeak, removed a container, brought it forward out of the carpenter shop to the ladder in the forward portion of the forepeak back of the ladder and there motivated by curiosity or otherwise, removed the cap and permitted the escape of the signal. No other reasonable inference can be made from the facts.

Uzdadinis himself frankly acknowledge he did not feel his supposed act of kicking the carton produced the subsequent escape of the distress signal. He testified:

> "Q. Did you advise any one at that time what you had done down in the store room? The answer to this is first yes or nor, and then you can explain it.
>
> "A. Well, yes I did.
>
> "Q. Who?
>
> "A. The only one was my buddy.
>
> "Q. Did you advise anybody else?
>
> "A. No. I felt more or less embarrassed and I thought I would be ridiculous from the fact I did such a thing,

that I was the cause of it. (Italics ours.) (Aps. 174, 175.)

Uzdadinis' testimony must be viewed in this further peculiar setting. The libel in this case was filed May 11, 1944. Apellee in his signed statement, (Appellant Exhibit A-1) (Aps. 155) on November 13, 1943, stated:

> "I had no idea who pulled this plug out of the distress signal as there were 1,200 troops aboard, about 100 sailors, in addition to the crew of the vessel which numbered fifty men." (Aps. 156.)

The action was tried January 9, 1945. At the trial, appellee testified he did not learn the identity of the seamen who kicked the smoke signal at Attu, (Uzdadinis) *until November* 7, 1944. Yet appellee testified with minute particularity as to what tasks Uzdadinis was performing before he sent Uzdadinis forward for tools (Aps. 57) just prior to the escape of the signal. Kenney, appellee's witness, testified that after the escape of the distress signal at Attu, there was considerable discussion among members of the crew as to who caused it "and nobody knew" (Aps. 349). Uzdadinis testified similarly (Aps. 182). It is highly unreasonable to assume that if Uzdadinis has been sent forward just shortly before the escape of the signal in the forepeak, his claimed visit thereto was not associated by appellee nor by any member of the crew as a possible cause of the incident until *one year and five months later.*

ALLEGED ACTS OF UZDADINIS NOT FORSEEABLE

Before the alleged acts of Uzdadinis can be denominated as negligent it must appear that his conduct should have been reasonably forseeable by the wrongdoer, (the officers of the vessel) at the instant of the wrong. Consequences which could not reasonably have been foreseen are not both natural and probable within the general test of proximate cause.

This court has recognized this rule in the recent case of *Sundberg vs. Washington Fish & Oyster Co.*, (1943) 138 Fed. (2d) 801 (C.C.A. 9), where the court said:

> "Proof of negligence on the part of the shipowner involves at least a showing that under existing circumstances the shipowners or his agents should reasonably have anticipated the danger of bodily injury to a member of the crew. * * * citing cases."

This rule has been uniformly applied by various Circuit Courts to Jones Act actions.

> "There is no actionable liability for an alleged negligent act unless injury resulting therefrom could have been foreseen in the light of the attending circumstances. Indeed, it may be said that, in the absence of wanton wrong or some failure to conform to some arbitrary or absolute standard of care 'forseeability' is a necessary test of the existence of negligence, and, if no injury can reasonably be expected to result, there is no negligence."

Johnson vs. Kosmos Portland Cement Co., (C.C.A. 6) 64 F. (2d) 193.

"But we think the court committted a more fundamental error in not directing a verdict for defendant for want of substantial negligence in respect of both causes of action. In neither were facts shown which would lead the defendant to anticipate the danger of injury to its seamen by virtue of the existing condition of the ship's appliances."

Pittsburg S. S. Co. vs. Palo, (C.C.A. 6) 64 F. (2) 198.
"It was not an insurer, being liable only if the injury was reasonably forseeable. It could not, however, have foreseen that libelant would walk into the pile of retarders just at the moment the lights went out. It follows that the court below was right in holding that there was no evidence of negligence imputable to respondent."

Calmar S. S. Corporation vs. Taylor (C.C.A. 3) 92 F. (2d) 86.

Conceding *arguendo* negligent stowage of the distress signals hase been proven it is submitted that no reasonable person could foresee the alleged act of Uzdadinis in kicking a carton container "one foot" could result subsequently in the escape of the contents of the container, which were securely packed and tightly stoppered, and stowed in a relatively inaccessible site in the forepeak.

It is respectfully submitted that in any event the testimoney of Uzdalinis as to his relationship in effecting the escape of the smoke signal is based entirely on speculation

and conjecture and fails to establish his negligence by that standard of proof which the law demands, namely, by a preponderance of the evidence. For that reason the finding of the trial court was erroneous.

ARGUMENT ON SECOND ASSIGNMENT OF ERROR

(2) The Court erred in making finding of Fact IV for the reason that said finding is not sustained by the weight of the evidence and is clearly erroneous. (Aps. 21.)

The finding of fact attacked reads as follows:

> "That on or about the 15th day of August, 1943, a fire occurred in No. 3 hold of said vessel, and that in the course of his employment, the libelant entered said hold wearing a gas mask. That the members of the crew, in fighting said fire, negligently directed a host against libelant, striking him in the face and causing the gas mask to be thrown from his face, subjecting him to fumes, smoke and water, and aggravating a pre-existing condition; and that libelant was not contributorily negligent. (Aps. 15.)

THE KISKA FIRE

The facts concerning the occurrence of a fire in No. 3 hold of the S.S. "GEORGE FLAVEN" on the morning of the Kiska invasion, August 15, 1943, are undisputed. As stated by appellee in his signed statement (Respondent's Exhibit A-1 Aps. 156) and corroborated by Second Officer Seather, (Aps. 368) the fire was caused when a "snow jeep" back fired, when two soldiers attempted to start it and the contents of the jeep, duffle bags, ignited. Chief Officer Kristiensen confirmed this. (Aps. 292.)

A fire alarm signal was immediately rung. Wearing an Army gas mask, appellee descended No. 3 hold, to ascertain the cause of the fire. He remained below ten minutes. (Aps. 149.) As he started to ascend the ladder, he claims to have been struck in the face by a stream of water poured in the hold from the deck by some unknown seamen. (Aps. 149.) He claims his mask was knocked to one side by the impact, and was not restored to position until he had ascended the ladder to the deck, which took approximately *twenty seconds*. (Aps. 149.) He did not attempt to readjust his mask immediately, although he could have done so. (Aps. 150.) Appellee admitted he had no recollection of mentioning this incident to Mr. Belie of the Grace Line, whom he consulted in November, 1943, in San Francisco, when preparing a claim. (Aps. 153.) Nor is it referred to in the detailed damage claim he filed with John H. Black (Appellant's Exhibit A-1, Aps. 155). Appellee's witness, Uzdadinis, stated Lubinski wore his gas mask as he ascended the ladder. (Aps. 185.)

The individuals holding the hose, which, it is claimed, struck appellee's face, were subsequently identified as mess boy members of the crew by Peter Corvia. (Aps. 199.) He claimed he looked down from the deck to the hold of No. 3 hatch and witnessed the occurence, despite the fact smoke was billowing out of the hold and obscuring vision. (Aps. 226.)

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Robert Kenney, appellee's witness, likewise stated the smoke billowing out of the hold obscured vision. (Aps. 352.)

Appellee admitted that at the time he ascended the ladder, the crew members on the deck could only see him intermittently because of the impaired visibility. (Aps. 79.) Chief Officer Kristiensen said the smoke was so dense in the hold he did not recognize appellee if he were in the hold. (Aps. 317.) Second Officer Seather agreed with this. (Aps. 363.)

In response to the general alarm of "Fire" hoses were quickly strung up and played into No. 3 hold to extinguish the blaze. The only testimony of the purported negligence of the mess boys comes from Corvia. On direct examination, he testified two mess boys had directed the full pressure of the hose, which was too much for them to handle, down in the hold. (Aps. 199.) He stated he then went to their assistance and succeeded, with their help, in directing the stream away from appellee. (Aps. 217.)

He testified:

"Q. Were those mess boys able to control that hose?

"A. Oh, no, it was impossible. (Aps. 200.)

"Q. And the other men stood around and just let the mess boys pour water on Lubinski?

"A. Sure. They didn't do it intentionally. They just couldn't help it." (Aps. 217.)

The testimony revealed that the fire on the ship the morning of the Kiska invasion created a very grave and emergent situation because of the danger to munitions carried and everyone aboard was frantically engaged in subduring the blaze, which was eventually successfully accomplished. The circumstances surrounding the purported acts of the messman in handling the hose, as described by Corvia, fall far short of violating any of the acknowledged canons of negligence. Corvia admitted that the messmen were powerless to control the hose because of the pressure. These mssmen cannot be charged with the extent of the pressure or the fact the hose was insufficiently manned. There is nothing to show that in the emergency they did not act reasonably.

It is well settled by the various Circuit Courts, that in acts of emergencies, persons are not held to the usual standard of care required.

> *Wabash Ry Co. vs. Walczak*, 49 F. (2) 763)C.C.A. Michigan).
>
> *Horton Motor Lines vs. Currie*, 92 F. (2) 164 (C.C.A. V.A.).

In *Katoska vs. May Dept. Stores Co.*, 28 F. Supp. 3, the syllabus of the Dstrict Court of California holding is:

> "One doing the best under the circumstances when confronted with a sudden situation should not be charged with negligence, even though it may appear that he might have acted differently if he had more time."

FIRE AT SEA AN ASSUMED RISK

Cargo fires are of frequent occurrence at sea and their extinguishment one of the assumed risks of the perilous calling of a seaman as much as hazards of the weather or of the sea.

In *Arizona vs. Anelich,* 298 U. S. 110, 80 L. Ed 1085, the United States Supreme Court said:

> "The seaman assumes the risk normally incident to his perilous calling."

In *The Cricket,* 71 F. (2d) 61, (C.C.A. 9), this court said:

> "The life of a seaman is hard. The nature of his calling subjects him to many dangers. The sailor knows this and assumes the risks incidental to his calling."

It is submitted that the lower court's finding of fact No. IV that appellee was injured at Kiska by the negligence of fellow seamen striking him with the force of the first hose has absolutely no factual basis and is clearly wrong.

ARGUMENTS ON THIRD ASSIGNMENT OF ERROR

(3) The Court erred in making finding of Fact V for the reason that said finding is contrary to the weight of the evidence and is clearly erroneous. (Aps. 21.)

Finding of Fact V, which is attacked as having no evidentiary support in the record, reads as follows:

"That as a direct and proximate result of the negligence of respondent United States of America as aforesaid, libelant received a severe intraocular injury to the eyeball, resulting in a uveitis and an inflammatory condition between the iris and the lens, and that he has suffered a complete and permanent loss of vision to the left eye, and that there exists a potential danger to his right eye as a result of the injury to his left eye; that at the time of receiving said injury libelant was an able-bodied man, with good eyesight, of the age of 29 years, with a normal life expectancy of 36.03 years, and earning approximately $500.00 per month as a seaman; that he was paid his wages to the end of the voyage of said vessel on the 28th day of September, 1943, and from said date to the 29th day of February, 1944, he was totally incapacitated from following any gainful occupation, and that his earning capacity has been permanently impaired; that he has suffered pain in the past, and now suffers pain on occasions from said eye; that he suffers humiliation and embarrassment by reason of the loss of sight in said eye and the necessity of wearing a covering on said eye; and that his totaldamage is the sum of $17,500.00." (Aps. 16.)

This assignment of error raises the question of whether appellee established by a preponderance of the evidence that either of the alleged acts of negligence at Attu or Kiska were the proximate causes of the development of the disease of iritis, or irido-cyclitis which destroyed the vision of appellee's left eye.

Appellee called as witnesses on this phase of the libel Dr. Paul Ziegler, a general physician, and U. S. Army Transport Surgeon on the S.S. "GEORGE FLAVEL," who testi-

fied by deposition and Dr. Purman Dorman, a Seattle eye specialist, who testified as an expert witness.

Applellant called three physicians, Dr. James C. Schumacher, appellee's attending physician at the United States Marine Hospital, San Francisco, California, and as expert witnesses, Dr. Otto H. Barkan of San Francisco and Dr. James R. Morrow of Seattle. All of these witnesses testified by deposition.

NATURE OF IRITIS

The testimony is undisputed that iritis (which involves the iris, part of the inner structures of the eye), or iridocyclitis or uveitis by which this disease is referred to in the record when it involves inner structures of the eye adjacent to the iris, is an inflammation of the region of the iris, most commonly caused by systemic or bodily infection and occasionally by a violent trauma penetrating the external structuresof the eye and damaging the iris. The inner structures of the eye affected by disease of the iris is revealed in Appellee's Exhibit A-9, being a cross-section of the human eye.

DR. ZEIGLER'S TESTIMONY

Dr. Zeigler stated he first treated appellee's left eye the latter part of August, 1943, (Aps. 500) and at no time did he treat both of appellee's eye-lids. (Aps. 503.) Appellee testified he visited Dr. Zeigler immediately after the smoke

signal escape at Attu on July 15, 1943, and both his lids were swollen. The only history of the onset of trouble in appellee's left eye given Dr. Zeigler was "he had been exposed to cold wind on the deck as well as dust and *possibly smoke.*" (Aps. 503.) (Italics ours.) It is to be noted this vague history of the onset of appellee's eye trouble differs materially from the allegations of negligence in his libel.

When he examined appellee's left eye, Dr. Zeigler stated he found no evidence of injury. He testified:

> "A. The eye was inflamed, red, and had a conjunctivitis. There was some discoloration of the iris.
>
> "Q. That is the pupil of the eye?
>
> "A. The iris is the coloring in the eye.
>
> "Q. At the time you made this examination did you observe any evidence of abrasion of the left eye-ball itself?
>
> "A. I did not.
>
> "Q. Did you observe any evidence of a foreign body in the left eye?
>
> "A. I did not." (Aps. 501.)

Dr. Zeigler's diagnosis was appellee was suffering from conjunctivitis and iritis of the left eye with associated neuritis of the face. He admitted he was not equipped with adequate optical instruments to make a study of the structures of appellee's inner eye. (Aps. 501.) As a general practitioner

he was very reluctant to express any opinion as to the cause of appellee's blindness in his left eye. He testified:

> "Q. For the purpose of this question, assuming the man had good eyes, would you then say that the smoke was the causative factor that brought the eye to the condition of a loss of vision?
>
> "A. I don't know." (Aps. 513.)

DR. DORMAN'S TESTIMONY

Dr. Dorman testified he examined appellee, March 29, 1944, (Aps. 115) and also the day before the trial (Aps. 122). His examinations, made many months after the alleged exposures of June 15, 1943, and August 15, 1943, led him to conclude that appellee was suffering from an iritis of the left eye which had destroyed his vision. (Aps. 121.)

In response to a long hypothetical question as to the cause of the iritis, Dr. Dorman was of the opinion there was a possible connection between the alleged exposures and the iritis.

> "The Witness: As the result of my examination and the taking of the history of the case, and in considera-ation that he had not had any eye difficulty previous to the date of July, 1943, I came to the conclusion that that injury that he had received to his eye was amply sufficient cause for the eye condition as I found it." (Aps. 125, 125.)

Dr. Dorman's answer indicated he considered the alleged twenty second exposure to the fire of No. 3 hold at

Kiska as of no consequence. On cross-examination, (Aps. 128) he said the Attu exposure was "the principal cause."

He admitted that the iritis could be due to a systemic condition. Yet he made no blood or x-ray tests or other tests to ascertain if a bodily infectious condition which could be discovered, was the cause of the iritis.

> "Q. When Mr. Lubinski presented himself to you for examination, did you make any examination yourself by x-ray or otherwise to determine whether he was suffering from any systemic infection?
>
> "A. No, I did not." (Aps. 138.)

The testimony of Dr. Dorman was most partisan and evasive. Despite the fact that appellee and all the witnesses has testified the Army gas mask which appellee wore at Attu was efficient and satisfactory. Dr. Dorman testified "it was not designed for this distress bomb." He had never seen it. (Aps. 130.) Dr. Dorman admitted he was not aware of the chemical constituents of the distress bomb, (Aps. 131) so obviously could not testify as to whether the signal when discharged at Attu possessed irritating properties to the internal chamber of the eye. He first admitted that "Fuchs' Diseases of the Eye" was "and excellent authority" (Aps. 135) in his profession, but then claimed its authoritative value had disappeared since Fuchs died in 1926. (Aps. 136.) Fuchs stated irido-cyclitis was only due to perforating injuries. (Aps. 135.)

At no place in his testimony did he testify he found any evidence of traumatic injury, penetrating or otherwise, to appellee's left eye.

His ultimate opinion that the alleged exposures to appellee's left eye *could* have produced iritis does not establish that it actually *did*. It is no more than the statement of one of several possible hypothesis.

TESTIMONY OF DR. SCHUMACHER

Appellants introduced the testimony by deposition of appellee's attending physician, Dr. James Schumacher, eye specialist at the United States Marine Hospital at San Francisco, California. He treated appellee from October 16, 1943, until February 9, 1944. (Aps. 462.) Previously Dr. Schumacher was professor of opthalmology at St. Louis University. (Aps. 474.) Appellee at first vigorously objected to Dr. Schumacher's testimony on the grounds of privilege, but subsequently waived it. (Aps. 483.)

Dr. Schumacher stated when he first examined appellee he found him suffering from "Iritis, chronic, left eye," (Aps. 463) and treated him for that condition.

Dr. Schumacher stated he received the following history of the onset of the iritis given him by appellee.

> "Q. Well, aside from the record, what is your recollection as to the history that he gave you?

"A. Well, the history which I took was that sometime in September, about, the patient was a little bit uncertain about it, but he said about September 7th, 1943, he was exposed to smoke and dust from the ship which caused an inflammation of his eye, his left eye." (Aps. 485.)

It is to be noted appellee gave no history of the Attu or Kiska incidents to Dr. Schumacher as the cause of his eye trouble. Subsequently, Dr. Schumacher testified, that a change was made by some other person in the hospital records showing the development of symptoms by appellee in his left eye as occurring in August, 1943. (Aps. 487.) This change in the records of the hospital was never explained.

Dr. Schumacher testified positively and unequivocally that the alleged exposures to the distress signal at Attu in July, 1943, or to the fire in Kiska in August, 1943, were not responsible for the condition of appellee's left eye.

"A. In my opinion, there is no relationship between the exposure to the smoke and the condition for which I treated him.

"Q. And will you explain why you have that opinion, Doctor?

"A. Well, iritis or iridocyclitis is an inflammation of the deeper tissues of the eye, and there are a limited number of things which cause it. The most common cause is some endogenous toxin, either a toxin as such, or a toxin from a disease, such as syphilis, tuberculosis, gonorrhea, or you can also get it from injuries; but the

injuries which do cause it have to be of a very severe nature, either a penetrating type of injury, or a very severe contusion of the eye are about the only things which will cause it.

"Q. Was there any history on the part of the patient, or from any other source that he had any such injuries which would be likely to cause or aggravate the condition of iritis or iridocyclitis?

"A. From the history that the patient gave me there was none." Aps. 490, 491.)

Dr. Schumacher further testified that the alleged smoke exposures of Attu and Kiska would not aggravate an existing iritis in libelant's left eye.

"Q. Assuming these exposures to smoke caused some inflammation of the eyelids and irritation of the eyes, as smoke would, state whether in your opinion that exposure and those resulting conditions caused or aggravated the present condition of iridocyclitis?

"A. Well, the inflammation of the lids or the irritation of the eye caused by the smoke, in my opinion, would not cause the iritis or the iridocyclitis or aggravate the condition that was present before." (Aps. 492, 493.)

As attending physician, Dr. Schumarcher's views are entitled to unusual weight, especially since his professional background and the fact that he was testifying in the role of the impartial physician and as an employee of the United States Government bespeaks the integrity of his professional opinions and his lack of bias in reaching them.

TESTIMONY OF DR. OTTO BARKAN

The opinion of Dr. Otto Barkan, a distinguished eye specialist of San Francisco, California, accorded with the opinion of Dr. Schumacher. Dr. Barkan examined appellee November 26, 1943, and found him suffering from a chronic irido-cyclitis of the left eye. (Aps. 396.) Appellee gave him no history of the distress signal incident (Aps. 397) at Attu nor the fire at Kiska. (Aps. 398.) Dr. Barkan stated emphatically the alleged smoke exposures at Attu or Kiska neither caused nor aggravated appellee's iritis in his left eye.

"Q. Doctor, what is your opinion as to whether or not the condition of iridocyclitis in Lubinski's left eye which you found present in your examination was caused or aggravated by the alleged exposure to smoke or fumes of July 15th, 1943, at Attu, Alaska?

"A. I don't think that the condition could have been caused, precipitated or even aggravated by the fumes of the smoke as described.

"Q. Why not, Doctor?

"A. Because a condition of this kind is essentially an endogenous one. That is, it comes from an internal cause; and in my experience and in the literature, it would be precipitated by an external injury, such as a bruise or contusion of considerable severity.

"Q. Doctor, in your opinion, is the temporary inconvenience and discomfort produced by a person being

exposed to smoke such as Mr. Lubinski was of a sufficiently severe character to aggravate or accelerate an iridocyclitis?

"A. Not in my opinion." (Aps. 401.) * * *

"Q. Doctor, when you use the term "endogenous," do you mean some internal infection?

"A. Yes. (Aps. 402.)

TESTIMONY OF DR. JAMES R. MORROW

Dr. James Morrow, an eye specialist of Seattle, Washington, and chief eye consultant at the U. S. Marine Hospital at Seattle, Washington, testified in person as the result of an examination made by him of appellee June 20, 1944. Appellee gave him a history of the Attu incident but not of smoke exposure at Kiska. (Aps. 407.) Dr. Morrow testified there was no evidence of external injury to appellee's left eye. (Aps. 413, 414.) Like Drs. Schumacher and Dr. Barkan, he was unequivocally of the opinion appellee's iritis (Aps. 408) was not due to the Attu or Kiska incidents. (Aps. 420, 421.)

Dr. Morrow stated that there must be a penetrating injury of the external eye structures for a traumatic iritis to result and he found no evidence of such penetration in appellee's left eye which would have permitted infectious matters to be transmitted externally from outside the eye into the iris and adjacent structures. (Aps. 422, 423.)

Dr. Morrow further testified that the drainage of the eye was from the inner eye externally to the body (Aps. 414) which would militate against external infections or irritants being carried into the inner eye. Other than having a blood test made of Appellee which was negative (Aps. 428), Dr. Morrow made no detailed examination to ascertain the particular systemic condition which could have been responsible for appellee's iritis nearly a year prior to his examination. Dr. Morrow stated that it would not be medically possible to examine a person for every internal source of systemic infection which could produce an iritis. (Aps. 417.)

In its memorandum opinion in appraising Dr. Morrow's testimony, the trial court said, "The testimony of Dr. Morrow who testified in court carried great weight." (Aps. 11.)

LOWER COURT'S ERRONEOUS CONCLUSION

The trial court erroneously ignored the overwhelmingly preponderant testimony of appellant's medical witnesses that iritis is a systemic disease and can only be traumatic when there is a penetrating wound of the external surfaces of the eye permitting entry of external infectious sources into the inner chamber of the eye from without or a severe contusion of the eye-ball. Admittedly there was no evidence in the record appellee suffered any such injury. The court said in its memorandum opinion:

> "It seems to me that, with the aid of modern medical tests, it could have been ascertained certainly whether or not the libelant had any infection in his system; but there was no proof of that at all." (Aps z11.)

The trial court completely overlooked the following testimony of Dr. Morrow:

> "Q. Is it medically possible to determine the specific cause of each and every infection causing an iridocyclitis?
>
> "A. No." (Aps. 441.) (Aps. 436.)

Medical testimony is hardly necessary to establish that the functioning of the human body is so mysterious that even post mortem examinations frequently fail to reveal the cause of disease or death.

The trial court placed the burden of establishing the cause of appellee's disease of iritis upon appellant. This was erroneous. The burden of proof at all time rested upon appellee to prove by a preponderance of the evidence that the exposures at Attu and Kiska caused his iritis. He did not meet this burden by the testimony of Dr. Dorman, who only admitted the exposures were a *possible* cause. On this state of the record appellant should have been entitled to a non-suit without introducing its testimony. When it did so it established preponderantly by its medical testimony that the alleged exposures of Attu and Kiska could not have been

the causes of appellee's iritis. Hence, the court erred in entering Finding of Fact V and finding the alleged exposures were the proximate cause of the iritis.

ARGUMENT ON FOURTH ASSIGNMENT OF ERROR

(4) The Court erred in rendering the final decree which was entered herein on March 12, 1945, adjusting that the libelant was entitled to recover from respondent, United States of America, the sum of Seventeen Thousand Five Hundred Dollars ($17,500.00) and his costs and disbursements in said action, for the reason that this portion of said decree is not supported by the weight of the evidence and is clearly erroneous.

For the reasons assigned in the Argument under Appellant's First, Second and Third Assignments of Error, the entry of the decree referred to in the Fourth Assignment of Error was clearly erroneous and the libel should be dismissed with prejudice.

CONCLUSIONS

We have the deepest sympathy for appellee in the misfortune he suffered in the loss of sight in his left eye. But as the United States Supreme Court said recently in the case of *De Zon vs. American President Lines*, 318 U. S. 660, 87 L. Ed. 1065, in denying a seaman's claim for injury:

> "The loss of petitioner's eye is a serious handicap. But damages may be recovered under the Jones Act only for negligence. *Jamison vs. Encarion,* (281 U. S.

639, 74 L. Ed. 1084). Whether the legislative polic of compensating only on the basis of proven fault i wise is not for us to say * * *."

As we stated at the outset of our brief, if the alleged ex posures at Attu and Kiska caused appellee's iritis, it woul appear that his claim could be asserted under the Secon Seaman's War Risk Policy.

We respectfully submit that since appellee has not estab lished by a preponderance of the evidence that appellant wa guilty of negligence or that any proven negligence was th proximate cause of his damages, the decree entered by th trial court was erroneous and should be dismissed.

Respectfully submitted,

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